Office - Supreme Court
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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 464

UNITED STATES OF AMERICA,

Appellant,

vs.

THE BORDEN COMPANY, BOWMAN DAIRY COMPANY, BELOIT DAIRY COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT OF BELOIT DAIRY COMPANY OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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Beloit Dairy Company.

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 51 C 947

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE BORDEN COMPANY, ET AL.,
Defendants

REPLY OF BELOIT DAIRY COMPANY TO APPELLANT'S STATEMENT AS TO JURISDICTION, AND SEPARATE MOTION OF BELOIT DAIRY COMPANY TO DISMISS IT AS AN APPELLEE AND TO AFFIRM JUDGMENT BELOW DISMISSING COMPLAINT AS TO IT.

Appellee Beloit Dairy Company is in a unique position in this case, because none of the four questions raised by appellant would apply to it, whichever way the Court might decide them, if it were to take the case on appeal. The questions presented by appellant do not concern Beloit and even if well taken as to the other appellees, afford no basis for disturbing the judgment below in its favor.

Beloit has joined in the other appellees' motion to dismiss the entire appeal or to affirm the judgment below in all

respects, for the reasons set forth therein. In addition, Beloit in this separate statement presents the grounds, specially applicable to it, upon which it opposes appellant's contentions as to the jurisdiction of the court and moves that it be dismissed as an appellee and that the judgment of dismissal below be affirmed as to Beloit.

Jurisdiction

The judgment of the district court was entered on June 17, 1953. The judgment dismissed Beloit Dairy Company as a defendant herein.

One hundred and seven days later, on October 2, 1953, the Government filed its Petition for Appeal, naming as appellees all five of the defendants which stood trial in the court below.

The Government relies, in its Statement as to Jurisdiction (p. 2) upon Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, which provides:

> "In every suit in equity brought in any district court of the United States under any of said Acts [including the Sherman Act], wherein the United States is complainant *an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof* * * *." (Emphasis added.)

It appears on the face of the record that, unless tolled, the time for the Government's appeal had elapsed forty-seven days before this appeal was taken. It is the contention of Beloit Dairy Company that the time was not tolled as to the judgment dismissing it as a defendant in the case.

The Expediting Act in terms does not authorize tolling of the sixty-day limitation on the right to appeal from a

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final decree of a district court in a Sherman Act case, but in practice, a pending motion to amend the findings, the necessary effect of which is to deprive the judgment of "that finality which is necessary to appealability", (*Leishman* v. *Associated Electric Co.*, 318 U. S. 203, 205 (1943)) tolls the time limit until sixty days after the district court rules on such a motion. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 177 (1944). The reason for this holding is (323 U. S., pp. 177-178):

> "The motion to amend the findings tolled the time to appeal if it was not addressed to 'mere matters of form but raised questions of substance,' e. g., if it sought a 'reconsideration of certain basic findings of fact and the alteration of the conclusions of the court.' *Leishman* v. *Associated Electric Co.*, 318 U. S. 203, 205 * * *."

The reason assigned in *Crescent* for tolling the time for taking the appeal is to be particularly noted: the motion which was pending when the statutory time ran out was a motion which "sought a 'reconsideration of certain basic findings of fact and the alteration of the conclusions of the court.'" Likewise, in *Leishman*, the time to appeal (under a different statute) was tolled by a motion because "the necessary effect was to ask that rights already adjudicated be altered." (318 U. S. 205.)

The "rights already adjudicated" between the United States and Beloit Dairy Company in the instant case were: the United States had no right to equitable relief against Beloit under Section 1 of the Sherman Act; the United States had no right to equitable relief against Beloit under Section 2 of the Sherman Act; and the United States had no right to equitable relief against Beloit under Section 2(a) of the Clayton Act, as amended by the Robinson-Pat-

man Act. That these were the rights adjudicated as between these parties is shown by three things:

a. Beloit's motion to dismiss, dictated into the Record on March 24, 1953,[1] which states:

> "* * * There comes now defendant, Beloit Dairy Company, at the close of plaintiff's case, and after the plaintiff has rested, and moves the Court, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, for *an order and a judgment of dismissal of the Beloit Dairy Company as defendant herein,* for the following reasons:
>
> "1. That plaintiff has failed to establish facts which under the law entitle it to the relief requested against Beloit Dairy Company.
>
> "2. That plaintiff has failed to prove the allegations of the complaint, that Beloit Dairy Company was a party to or participated in a combination or conspiracy to restrain or monopolize sales of fluid milk in interstate commerce to wholesale customers and public institutions in the Chicago area, in violation of Sections 1 and 2 of the Sherman Act.
>
> "3. That plaintiff has failed to prove the allegations of the complaint, that this defendant, Beloit Dairy Company, in combination with the other defendants have monopolized the sale of fluid milk in interstate commerce to wholesale customers and public institutions in the Chicago area in violation of Section 2 of the Sherman Act.
>
> "4. That plaintiff has failed to prove the allegations of the complaint that this defendant, Beloit Dairy Company, has granted discriminatory prices, rebates, discounts, or allowances in sales of fluid milk in interstate commerce to wholesale customers in the Chicago area, as alleged in the complaint in violation of Section 2(a) of the Clayton Act.

[1] Trial Transcript 2415-2417.

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"And 5. That the plaintiff has failed to prove any imminent and immediate danger of public injury by the alleged activities of this defendant, entitling plaintiff to injunctive relief." (Emphasis added.)

b. The trial court's Memorandum and Order, rendered March 30, 1953, (*United States* v. *Borden Co.*, 111 F. Supp. 562, 580) which states:

"The *motion of each defendant* to dismiss that part of the complaint which charges violations of Sections 1 and 2 of the Sherman Act must be granted." (Emphasis added.)

which further states (111 F. Supp. at 580):

"In the instant case, the Government has proved the occurrence of only one sale by the Beloit Dairy Company; that was the sale of certain dairy products to the Eitel Restaurant in Chicago in 1947 (Exhibit 738). With respect to Beloit Dairy Company, therefore, the Government has not shown a right to relief under Section 2(a) of the Clayton Act. *Beloit's motion to dismiss the complaint must therefore be granted in its entirety.*" (Emphasis added.)

and which further states (111 F. Supp. at 582-583):

"For the reasons stated in this memorandum *the motion of each defendant* to dismiss the complaint is granted in its entirety, and, accordingly, the complaint is dismissed."

c. The judgment entered by the trial court on June 17, 1953,[2] on the basis of its Findings of Fact numbers 34 and 35 (that there was no evidence competent as to Beloit that it was a party to a conspiracy,[3] and there was proof of only

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[2] Item 8 of Praecipe.

[3] Finding number 34, fully set out at p. 7 *infra*.

one sale by Beloit)[4] and its conclusions of law, ordered, adjudged and decreed:

> "1. That *the motions to dismiss be and are hereby granted;*
> "2. That the complaint be and is hereby dismissed as against said defendants;
> "3. That judgment on the merits be and is hereby entered against the plaintiff and in favor of said defendants." (Emphasis added.)

There was no action taken after June 17, 1953 by either the plaintiff or the trial court which might have led to a "reconsideration of certain basic findings of fact" (*Crescent* and *Leishman* cases, quoted at p. 3, , *supra*) as to Beloit's innocence, or "the alteration of the conclusions of the court" (*idem.*) as to Beloit's non-liability, and hence there was no tolling of the time within which to appeal from the judgment dismissing Beloit. If plaintiff had questioned any part of the proceedings which led to the findings, conclusions, and judgment concerning Beloit (which it certainly could have done under the Rules) the time to appeal from the dismissal of Beloit might have been tolled, as it apparently was with respect to the other four defendants. However, the following were the only points raised in the Government's June 26, 1953 motion which asked for "a new trial or, in the alternative, that the judgment of June 17, 1953 be opened, additional testimony taken, the findings of fact and conclusions of law amended and a new judgment entered":

1. The first point in the motion was:

> "That the Court erred in refusing to permit plaintiff to use the deposition of the witness Hezekiah C. Eggleston, taken on March 23, 1951 in the case of *Dean Milk Company* v. *American Processing & Sales Com-*

[4] Finding number 35, fully set out at p. 9 *infra.*

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pany, et al., No. 49 C 1159, for the purpose of impeaching the witness Eggleston during his testimony in the trial of this case. The Court ruled that the deposition was under seal and not available to plaintiff."

This deposition could not have been used against Beloit. Beloit was not a party to the *Dean Milk Company* case, had no notice of the taking of the deposition, and was not represented thereat.[5]

Rule 26(d), F. R. C. P., restricts the permitted use of depositions, whether for evidence or for impeachment, in the following terms:

> "*Use of Depositions.* At the trial * * *, any part or all of a deposition, so far as admissible under the rules of evidence, may be *used against any party who was present or represented at the taking of the deposition or who had due notice thereof,* in accordance with any one of the following provisions:
>
> "(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness." (Emphasis supplied)

Clearly, the district court could not have permitted use of the Eggleston deposition against Beloit so this ground of plaintiff's motion did not seek a reconsideration of Finding of Fact number 34[6] that:

> "All of the evidence competent as to Beloit fails to establish the existence of a conspiracy, as alleged in the complaint, or the participation therein by Beloit."

2. The second point in the Government's motion was:

> "That the witness Hezekiah C. Eggleston testified falsely to material facts concerning his participation,

[5] Plaintiff's offer of Proof (Item 4 of Praecipe) states only that "counsel for the defendants Bowman Dairy and Borden Dairy were present" when the deposition was taken. (See also, Trial Transcript 2353)

[6] Item 8 of Praecipe.

as Sales Manager and Vice-President of the Bowman Dairy Company, in the conspiracy charged in the complaint. Exhibits 5 and 6 attached hereto and Appendix I to plaintiff's Brief in Spport of this Motion relate to some contradictions between the testimony of the witness Eggleston at this trial and statements made by Eggleston on former occasions."

Neither the testimony of Eggleston during the trial nor the alleged statements in Exhibits 5 and 6 attached to plaintiff's motion [7] and Appendix I to plaintiff's Brief in Support of the Motion [8] made any mention of Beloit.

3. The Government's third ground for a new trial was:

"That the Court erred in refusing to allow plaintiff to play in open court recordings of interviews between the witness Paul D. Newey and various representatives of defendants. These interviews contained many admissions by agents of the defendants relating to the issue of conspiracy which was decisive in this case."

The witness Newey had no conversation with any Beloit representative.[9]

4. Plaintiff's next complaint was:

"That the Court erred in excluding the offered testimony of the witnesses Eggleston and Moser relating to conversations between these witnesses and deceased employees and officers of defendants relating to the fact of conspiracy charged in the complaint, the decisive issue in this case."

The offered testimony of the witnesses Eggleston [10] and

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[7] Item 11 of Praecipe.

[8] Not added to the Record below or on this Appeal by Government counsel.

[9] Tr. 2353.

[10] Plaintiff made no offer of proof pursuant to Rule 43, F.R.C.P. regarding this conversation and nothing in the pertinent pages of the transcript (Tr. 638-639, 769-770) indicates that Beloit was in any way mentioned in the supposed conversation between Bowman and Borden employees.

Moser [11] include no references to Beloit, and contain no evidence competent as to Beloit.

5. Plaintiff's fifth objection was:

> "That the Court erred in limiting plaintiff's proof to the period subsequent to 1940 when testimony of witnesses Heinz, Egglestor, and others was offered for the purpose of showing that the origins of the present conspiracy antedated the year 1940."

The Government has not included any objection to the order limiting proofs to the twelve and one-half years prior to the trial in this appeal. There was no evidence competent as to Beloit offered at the trial with respect to the period before 1940.

6. The final point in the Government's motion was:

> "That the Court erred in holding that defendants Bowman and Borden should not be required to present their defenses to the violations of Section 2(a) of the Clayton Act, which the Court found were shown by plaintiff, on the ground that the decree which was entered by another judge of this court in the case of *Dean Milk Company* v. *American Processing & Sales Company, et al.*, 48 C 1159, on December 3, 1952, enjoins these defendants from performing future violations of Section 2(a) of the Clayton Act."

The trial court's decision that defendants Bowman and Borden should not be required to present their defenses to the price discrimination charges against them does not apply to Beloit in any way. The court's Finding of Fact number 35,[12] that "plaintiff has offered competent and credible evidence of only one sale by Beloit to a wholesale customer; that was the sale of certain dairy products to the Eitel Restaurant in Chicago in 1947" was not affected by this part of plaintiff's motion. This was the finding on which

[11] Item 5 of Praecipe.
[12] Item 8 of Praecipe.

the court based its judgment that no price discrimination by Beloit had been proved:

In view of the fact, as above demonstrated, that the Government made no attack upon the judgment against it on its claims for relief against Beloit Dairy Company, its motion filed on June 26 did not operate to toll the time within which it might have appealed from the judgment granting Beloit's motion to dismiss. Cf. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Company*, 344 U. S. 206 (1952).

Beloit Dairy Company therefore respectfully submits that, as to it, the Government has failed to show grounds upon which the court has jurisdiction to entertain an appeal from the judgment dismissing Beloit in the court below.

We shall now show in addition, that the Government has not actually appealed from the judgment dismissing Beloit, and should not have named Beloit as an appellee.

Motion of Beloit Dairy Company To Dismiss Appeal or Affirm Judgment Below

Beloit Dairy Company, in addition to joining with its co-appellees in the Motion to Dismiss or to Affirm filed this day, hereby moves that this appeal be dismissed as to it, and that the judgment dismissing it entered by the district court on June 17, 1953, be affirmed, on the ground that no substantial question relating to said judgment is presented on this appeal.

The only references to Beloit in any of the papers filed by the plaintiff in perfecting its appeal are in the lists of defendants to which the citation and the statement calling attention to the provisions of Supreme Court Rule 12(3), are addressed and in a list of the defendants which stood trial, describing Beloit as "one small dairy, Beloit Dairy Co.—" at page 5 of the statement as to jurisdiction.

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The Government presents to the court four of the six points which it included in its motion filed on June 26, 1953 in the district court:

1. Refusal of the trial court to permit appellant to use the deposition of H. C. Eggleston, at the taking of which Beloit Dairy Company had no notice and was not represented, and which was taken in a case to which Beloit Dairy Company was not a party (see discussion and references, *supra*, at pp. 6-8).

2. The fact that certain tape recordings containing no competent evidence as to Beloit and no statements by agents of Beloit were not used as evidence. (See discussion and references, *supra*, at p. 8).

3. The exclusion of testimony, which contained no references to Beloit, as to two witnesses' conversations with a deceased agent of another defendant. (See discussion and references *supra*, at pp. 8-9).

4. The trial court's reference to the decree in another case, to which Beloit was not a party, as a reason for refusing to grant the Government's relief against selling at discriminatory prices, by other defendants but not by Beloit. (See discussion and references *supra*, at pp. 9-10).

In addition to the reasons stated in the joint motion of Beloit and the other appellees to dismiss or to affirm, Beloit cites the fact that none of the rulings and actions of the trial court to which the Government objects on this appeal excluded from the record any evidence competent as to Beloit or resulted in any different judgment on the Government's claims against Beloit than would have ensued if the trial court had done exactly what the Government now contends it should have done.

Where there is a failure to prove a cause of action against one of several defendants, justice requires the court to deal separately with the rights of such a defendant, regardless of whether the judgment of the trial court is joint or several.

Pennsylvania Railroad v. *Jones,* 155 U. S. 333, 354, (1894); *Washington Gas Light Co.* v. *Lansden,* 172 U. S. 534 (1899). In the instant case, the trial court entered separate findings as to Beloit and granted the several motions to dismiss of Beloit and the other defendants, making it easy to segregate the judgment in favor of Beloit from the rest of the case.

No substantial question, and indeed no question whatsoever is presented to the Supreme Court by the Government as grounds for reviewing here the judgment of the trial court against the United States and in favor of Beloit Dairy Company.

It is respectfully submitted, therefore, that the said judgment of the trial court should be affirmed or, in the alternative, that the appeal should be dismissed as to this defendant.

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